Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Accelerated Docket for Complaint Proceedings	)	CC Docket No. 96-238
	)	

ERRATUM

On September 3, 1998, BellSouth Corporation (BellSouth) filed its Petition for Reconsideration and Clarification in the above-referenced proceeding. After filing its petition, BellSouth discovered inadvertent errors including a technical error in which portions of text shown as deleted on a word processing monitor were not actually deleted from the text as filed. Accordingly, BellSouth files this erratum to amend BellSouth's petition as follows:

Amend page 2, line 13 – change "b" to "be."

Amend page 3, lines 10-14, delete first two sentences of paragraph.

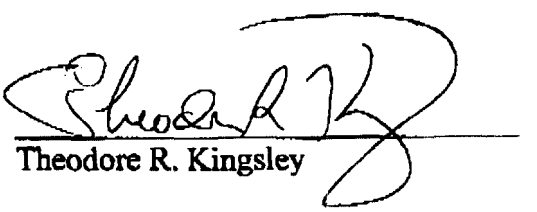
Amend page 5, line 9 – change "not less than twenty" to "ten."

Amend page 10, "Conclusion", delete sentence fragment above signature line.

With this erratum, BellSouth files a copy of its petition reflecting these corrections.

Respectfully submitted,

BELLSOUTH CORPORATION
By its Attorneys:



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Date: September 4, 1998

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Accelerated Docket for Complaint Proceedings	)	CC Docket No. 96-238
	)	

PETITION FOR RECONSIDERATION AND CLARIFICATION

BellSouth Corporation,[1] on behalf of its affiliated companies, by counsel, files its petition for reconsideration and clarification of the Commission's Second Report and Order released in the above referenced docket.[2]

I. THE COMMISSION SHOULD RECONSIDER ITS "AUTOMATIC DOCUMENT PRODUCTION" RULE

The Commission should reconsider its rule of "automatic"[3] document production.[4] The record does not support the Commission's adoption of the rule. As the Commission noted, several commenters asserted vigorously that it "will be impossible for defendants in complaint

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[1] BellSouth Corporation (BSC) is a publicly-traded Georgia corporation that holds the stock of companies which offer local telephone service, provide advertising and publishing services, market and maintain stand-alone and fully integrated communications systems, and provide mobile communications and other network services world-wide.

[2] *Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers*, CC Docket No. 96-238, Second Report and Order, FCC 98-154 (rel. July 9, 1998), ("*Second Report & Order*").

[3] The Commission's choice of words is unfortunate. There is nothing "automatic" about an "automatic document production" rule. Documents will have to be manually sought out, gathered, investigated, evaluated by human resources pursuant to a Commission-prescribed-four step process, copied and produced while defendants are concurrently preparing their answers and affirmative defenses during a 10 day period. As any business enterprise and law firm knows, such activities are taxing enough on resources given less burdensome requirements and a more reasonable time to comply.

[4] *Second Report & Order* at ¶ 51.

actions to comply with a rule requiring the automatic production of documents concurrent with an answer that is due less than 20 days after the filing of a complaint."[5] No party disputed these assertions (or any other argument against adopting such a rule, because the Commission prevented such opposition by not allowing reply comments.)[6] Therefore, considering the comments in the record, the only reasonable conclusion that the Commission could draw is that automatic production is not possible. Nevertheless, the Commission adopted the approach, supplying its own unsupported and conclusory reasoning to justify its actions.

For example, the Commission states that defendants will have more opportunity to assemble the appropriate documents because parties to a complaint proceeding will gain "detailed notice of the facts and legal issues involved in a case" during "supervised prefiling discussions."[7] The Commission's attempt to eat its cake, while at the same time preserving it for later consumption, puts unwarranted tension on the process. After receiving notice of an impending formal complaint (which may or may not be "detailed"), a defendant must decide whether to (1) devote his energies and resources to a good faith attempt to resolve the dispute through meaningful settlement discussions, or (2) to marshal the troops required to defend his interests in an accelerated proceeding. The latter option will include, among other tasks, preparing an answer to the complaint (to be filed within ten days of service of the complaint), identifying, locating, reviewing, copying, and producing every document that meets the nebulous standard established by the Commission for the automatic production in accelerated proceedings, and otherwise generally prepare a legal defense strategy. The Commission must decide whether

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[5] Id. ¶ 49.

[6] *Common Carrier Bureau Seeks Comment Regarding Accelerated Docket for Complaint Proceedings*, Public Notice DA 97-2178 (rel. December 12, 1997).

[7] *Second Report & Order* at ¶ 50.

the purpose of its prefiling negotiation procedure it to promote settlement and resolve disputes, or whether it is a procedural safety valve for its unreasonably short litigation alternative to formal complaint resolution. The Commission's ill-considered new rules are likely to have the unintended effect of increasing the cost of litigation and actually reducing the likelihood of pre-complaint settlements.[8]

The Commission justified its automatic production rule with the following wholly unsupported statement: "*We believe* [the automatic production rule] "*may* make the document portion of the discovery process demand less of the parties' time and move more quickly" than the process adopted in the *First Report & Order*...."[9] This belief is not grounded in any citation to the record or to experience. Instead, the Commission justifies the rule by opining that if a document is automatically provided by one party, the other party will thereby be relieved of the obligation to review a document index and thereafter request particular documents.[10] This rationale overlooks the substantial waste of limited resources caused by automatic production of documents that the opposing party may neither need nor want and which would not otherwise have been produced. This problem is even more acute when viewed in the context of the other abbreviated deadlines imposed by the Commission's new rules.

The Commission also suggests that descriptions of documents, even when prepared in the best of faith, inevitably inject a subjective component into the discovery process.[11] But this is precisely the approach the Commission found would facilitate rapid resolution of formal

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[8] *See generally* Samuel Issacharoff & George Lowenstein, *Unintended Consequences of Mandatory Disclosure*, 73 Tx. L. Rev. 753 (1995) (Suggesting that mandatory document disclosure will increase the costs of litigation and the likelihood of strike suits, while diminishing the prospect of early settlement.)

[9] *Second Report & Order* at ¶ 51(emphasis added).

[10] *Id.*

complaints a mere ten months ago.[12] The Commission cited to no experience gained under the new rule, under the old rules, or any evidence in the record supporting this new, and markedly different, conclusion. The Commission goes on to state that "contrary to the assertion of certain commenters, we believe that parties will expend markedly fewer resources in assembling and producing the appropriate documents than they would in assembling the documents and then preparing the detailed index required under the First Report & Order."[13] This is pure conjecture of the highest order. The statement is without any foundation in the record or the experience of the Enforcement Division. It assumes that parties will assemble and produce documents without preparing an index to the documents they produce, and that the Commission is granting a benefit to parties by suspending a formal indexing requirement. Underlying the Commission's conclusion is the assumption that, if the new rule is less burdensome than a rule in the *First Report & Order*, the new rule is presumptively reasonable. What the Commission apparently fails to consider is that the discovery rules recently adopted in both proceedings are more onerous than the provisions of Fed.R.Civ.P. 26.

Under Rule 26, the initial disclosure of documents is due within ten days of the discovery meeting required by Rule 26(f), which in turn must be held at least fourteen days prior to the Rule 16(b) scheduling conference. In cases where there is no Rule 16(b) scheduling conference, the initial disclosure must take place within eighty-five days after the defendant is brought into the case. The "bottom-line" impact of these related and interdependent deadlines is that the defendant in a federal court case, at its option, can have at least eighty-five days to produce

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11 *Id.*

12 *Complaint R & O* at 22547-22551.

13 *Second Report & Order* at ¶ 51.

documents. By contrast, the Commission's rules require initial production ten days after the complaint is filed in all cases. BSC does not believe that the record in this matter supports the Commission's decision to impose discovery deadlines that are so dramatically more onerous than the rules applicable in matters litigated in a federal court.

Moreover, the Commission's adoption (in the face of acknowledged majority opposition in the record) of the "likely to bear" standard is also inconsistent with the Federal Rules of Civil Procedure. In fact, the precise standard adopted by the Commission was withdrawn by the Advisory Committee that drafted Fed. R. Civ. P. 26(a)(1), which instead adopted the "relevant to disputed facts standard."[14] Again, the Commission has not explained why it should deviate from the standard appropriate to the document index required under its formal complaint rules, or why its judgment is superior to that of the Advisory Committee to the Federal Rules of Civil Procedure, other than the fact that federal courts in East Texas have adopted a similar standard. As the procedural rules adopted by the United States District Court for the Eastern District of Texas are not controlling on the Commission, the Commission's decision to adopt them is arbitrary in light of the record evidence.

Notwithstanding the good intentions of the Commission to resolve cases faster, simply adopting a rule requiring carriers to "do it, and do it now" will not answer the serious questions raised by parties filing comments. By revising the statutory complaint resolution deadlines under section 208, Congress has repeatedly told the FCC to resolve formal complaints in a timely manner. Yet, notwithstanding the periodic streamlining of its procedural rules, cases prosecuted and defended to conclusion pursuant to the streamlined rules remain undecided at the

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[14] C. A. Wright, A. Miller & R. Marcus, Federal Practice and Procedure, § 2053, at p. 634 (1994).

Commission. If this is because there is a "limited resource" problem at the FCC, the Commission should at least be honest enough to acknowledge that resource limitations are as real in the ever shifting landscape of the competitive telecommunications industry as they are in a government agency. It should not impose unrealistic "automatic document production" requirements on carriers, particularly when such carriers were not given the opportunity to reply to any of the comments filed in this proceeding.

II. THE COMMISSION SHOULD RECONSIDER ITS DETERMINATION THAT EX PARTE RULES DO NOT APPLY TO PRE-FILING ACTIVITIES

The Commission should not permit *ex parte* discussions with staff during the pre-filing settlement discussions. In its *Second Report and Order* the Commission notes that one party raised this issue, but the Commission dismisses the concern by stating that the *ex parte* rules apply only after the complaint is filed.[15] This superficial analysis begs the question of fundamental fairness: if the Commission's *ex parte* rules are designed to promote fairness through the formal complaint process at the commission, they should apply to pre-filing discussions which, having been deemed mandatory, have now become a part of the formal complaint process.

Moreover, the Commission relies on the existence of the pre-filing negotiation process as justification for imposing its automatic document production rule, and for justifying its foreshortened pleading periods. The pre-filing process is therefore essential to the Accelerated Docket, and the *ex parte* rules should apply at the same time a party makes an inquiry of the Commission concerning inclusion of a matter on the docket. If the *ex parte* rules did not apply, Enforcement Staff who held off the record *ex parte* discussions with an adverse party would of

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[15] *Second Report & Order* ¶ 36.

necessity become fact or even expert witnesses, and their conversations, notes and records could be subject to discovery through document production and deposition. It would be far better to apply the *ex parte* rules at the beginning of the Accelerated Docket process, that is, at the time a party submits a request to the Chief, by phone or in writing, seeking inclusion of its complaint, on the Accelerated Docket.[16]

III. REQUESTS FOR EXTENSION OF TIME SHOULD BE CONSIDERD

It is the policy of the Commission that extensions of time shall not be routinely granted.[17] The Commission has consistently followed this policy in all complaint proceedings. The Commission, however, should give serious consideration to making an exception to this policy with respect to requests for extension of time, particularly joint requests for extension of time, in cases accepted onto the Accelerated Docket. It would not be unreasonable to expect that in the current environment, fact and expert witnesses could be involved in local competition and other proceedings across the country before state commissions, thus presenting very real and unavoidable time conflicts. Further, such individuals, as employees of carriers, have significant and important jobs to do, often implementing the Commission's own requirements.

It is customary for parties to cooperate in the scheduling of witnesses to accommodate these concerns, as well as for the personal conflicts that, from time to time, affect the ability of counsel to parties to maintain a trial schedule. Joint requests for extension of time, in particular, reflect traditional professional courtesies and cooperation, and help build cooperative

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[16] Applying the *ex parte* rules at the prefiling stage would not prevent necessary communications between a party and the staff, but would ensure notice and an opportunity to participate by other interested persons. *See* 47 C.F.R. § 1.1202(b). The Commission should clarify that any person that is a potential defendant to a planned Section 208 complaint is a "party" for purposes of application of the *ex parte* rules at the prefiling stage.

[17] 47 C.F.R. § 1.46(a).

relationships between parties engaged in litigation. The Enforcement Staff has been given "substantial discretion" to ascertain admissibility to the Docket;[18] in light of the severe time constraints posed by the new rules, the staff should have substantial discretion to grant requests for extension of time.

Where the staff has substantial discretion to control the record, and little or no discretion to modify severe procedural time constraints, such a policy exception is necessary in order to allow parties to present sufficient evidence to allow the Commission staff, or the Commission on review, to take a hard look at the issues presented in any Accelerated Docket case and to engage in reasoned decision making. Such a policy exception would further help obviate the need for parties, taking an appeal pursuant to 47 U.S.C. § 402(b) and 28 U.S.C. § 2342, to ask the reviewing court for leave to adduce additional evidence pursuant to 28 U.S.C. § 2347(c).[19] If the Commission's ultimate goal is to resolve matters more quickly through the use of its Accelerated Docket, that goal will be frustrated by appeals, and subsequent remands, where the staff has been unreasonable in its zeal to move matters swiftly, or where the staff has been bound by Commission policy embodied in Rule 1.46 to limit a party's ability to introduce material facts into a proceeding. The staff should have the discretion to grant unilateral and opposed requests for extension of time if the interests of justice require, and there should be a presumption in favor of granting joint requests for extension of time.

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[18] *Second Report & Order*, app. at 13, *to be codified* at 42 C.F.R. § 1.730(e)(6).

[19] It would also lessen the chance that the staff's exercise of substantial discretion in connection with the use of abbreviated proceedings in any Accelerated Docket case would effectively preclude meaningful judicial review, thereby requiring a remand from the reviewing court.

IV. THE COMMISSION SHOULD CLARIFY SEVERAL ASPECTS OF ITS NEW RULES

The Commission's new rule states that a party that contemplates filing a formal complaint may submit a request to the Chief of the Bureau's Enforcement Division either by phone or in writing, seeking inclusion of its complaint on the Accelerated Docket. The rule goes on to state:

> In appropriate cases, Commission staff shall schedule and supervise pre-filing settlement negotiations between the parties to the dispute.[20]

The rule's grammar is ambiguous. "In appropriate cases" could refer to either (1) cases appropriate for inclusion on the Accelerated Docket: or (2) cases that are appropriate for supervised settlement negotiations. The rule could be interpreted as allowing Enforcement Bureau staff to put cases that are not appropriate for settlement straight onto the Accelerated Docket.[21] In this case, a defendant would lose all of the purported benefits of the supervised settlement period in which to prepare its answer and document production. The Commission should therefore clarify that supervised negotiations are mandatory for all cases accepted onto the Accelerated Docket.

During the thirty days following the effective date of the Commission's Accelerated Docket Rules, any party to a pending formal complaint proceeding in which an answer has been filed or is past due may seek admission of the proceeding onto the docket.[22] The Commission should clarify that pending formal complaint proceedings in which discovery has completed and there are no motions to be decided, are not eligible for inclusion on the Accelerated Docket.

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[20] 47 C.F.R. § 1.730(b).

[21] *Second Report and Order* at ¶ 33. The text of the Order does not support this interpretation, nevertheless, the rule remains partially ambiguous on its face.

[22] 47 C.F.R. § 1.730(d).

CONCLUSION

For the foregoing reasons, BellSouth respectfully requests that its Petition for Reconsideration and Clarification be granted.

Respectfully submitted,

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